

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2004-000235

09/07/2006

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

ARIZONA STATE DEPARTMENT OF
REVENUE

LISA A NEUVILLE

v.

RODNEY HUFFINE, et al.

BRIAN J CAMPBELL

MINUTE ENTRY

The Court has considered Plaintiff's Motion for Summary Judgment and the briefs. The Court finds and rules and follows.

Background and arguments

In this action, Defendant seeks a refund of taxes paid by her and her late husband on federal pension income for tax years 1986 through 1988. The State has moved for summary judgment on the ground that Defendant failed to file timely refund claims. The State seeks, first, to apply to this defendant the Tax Court's ruling in the consolidated case *Arizona State Dept. of Revenue v. Barrett*, TX2004-000209, which shares the same fact pattern but into which the present action was not consolidated. It further argues that failure to initiate an action for refund within the statutorily prescribed period acts as an absolute bar to recovery. Defendant asserts that the doctrine of virtual representation cannot apply, as Defendant was not a party to *Barrett* and there is no showing that her interests, however similar to those of the *Barrett* defendants, were represented in that case. As for the failure to file a refund claim by the deadline, Defendant acknowledges the timing, but argues that the limitations period should be tolled for the period during which *Bohn v. Waddell* was before the courts, restarting only after the Court of Appeals

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decision dismissing the case and the subsequent failure of the *Bohn* plaintiffs to pursue relief in the courts.

Virtual representation

It is not necessary to employ the device of virtual representation to extend this Court's *Barrett* ruling to this case. The procedural posture is that both the *Barrett* cases and the present action are appeals from a consolidated decision by the Arizona Board of Tax Appeals; for some reason the State chose to proceed by filing individual complaints against each taxpayer. While most of the individual cases were reconsolidated into *Barrett*, this one remained separate. The facts, however, are identical to those analyzed in the consolidated *Barrett* decision. As the parties and the Court have on several occasions recognized (for instance, in the State's Motions to Continue on Inactive Calendar of July 5, 2005 and December 12, 2005), *Barrett* has at least some standing as law of the case, permitting its citation under ARCAP 28(c), and has considerable value as persuasive, if not binding, precedent. Defendant has the opportunity to argue against the application of *Barrett*, just as it would to argue against the application of any other case law. Therefore, while recognizing the value of consistency for the purposes of future appellate review if nothing else, the Court considers Defendant's arguments.

Tolling the statute of limitations

There is a distinction between the situation here and that in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983). That distinction is the matter of jurisdiction. The trial court in *United Airlines* had refused to certify the class because it failed the numerosity requirement. *Supra* at 388. There was no dispute that the District Court had jurisdiction to hear the case. Similarly, the *Crown, Cork & Seal* court denied class certification on the ground of atypicality; again, there was no suggestion that a class action filed by a proper named plaintiff could not have proceeded. *Supra* at 347-48. Here, on the other hand, the *Bohn* claimants failed to exhaust their administrative remedies, a jurisdictional prerequisite. *Bohn v. Waddell*, 174 Ariz. 239, 244-45 (App. 1992). The claimants then resolved their disputes with the Department of Revenue out of court, abandoning their suit.

The effect of filing an action in a court lacking jurisdiction has not been directly addressed by the Arizona courts. It would appear that this situation is governed by the same rule as an action dismissed for failure to prosecute, which does not toll the limitations period. *Suppeland v. Nilz*, 128 Ariz. 43, 46 (1980). Moreover, Arizona case law is clear that the provisions of A.R.S. § 42-1118 may not be waived. *Hamilton v. State*, 186 Ariz. 590, 593-94 (App. 1996). Where rights are clearly defined by statute, the Court acting pursuant to its power in equity may not change such rights. *Ayer v. General Dynamics Corp.*, 128 Ariz. 324, 326

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(App. 1980). Simply put, by failing to follow the statutory procedure, Defendant took the risk that the class action might not reach the stage at which *Arizona Dept. of Revenue v. Dougherty*, 200 Ariz. 515 (2001), would vest her claim despite such failure.

Ruling

As there is no dispute as to the facts and the issue is purely one of law, summary judgment is appropriate.

Therefore, IT IS ORDERED the Arizona Department of Revenue's Motion for Summary Judgment is granted.